

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of J.U. and DEPARTMENT OF JUSTICE,
U.S. MARSHALS SERVICE, Cleveland, OH

*Docket No. 00-2037; Submitted on the Record;
Issued December 18, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that it was untimely filed and failed to demonstrate clear evidence of error; and (2) whether appellant met his burden of proof to establish that his emotional condition was causally related to factors of his employment.

On March 6, 1997 appellant, [REDACTED], filed an occupational disease claim, alleging that factors of his employment caused an adjustment disorder with mixed anxiety and depression. In support of his claim, he submitted reports from [REDACTED], a rehabilitation psychologist, and documentation requesting 198 hours of compensation. By letter dated May 27, 1997, the Office informed appellant of the type of evidence needed to support his claim. In a second letter that day, the Office requested that the employing establishment furnish information regarding appellant's claim.

In an undated response date stamped by the Office on July 21, 1997, appellant alleged that, beginning in the fall of 1994 and continuing, he had been the subject of an "intense three-year campaign of harassment and ethnic discrimination" by his immediate supervisor [REDACTED], who had referred to him with ethnic slurs and conducted daily harassment with unreasonable demands and micro managing. Appellant further stated that he had filed a federal lawsuit against the employing establishment. By letter dated July 23, 1997, the Office informed appellant that he needed witness statements in support of his allegations.

Appellant also submitted further reports from [REDACTED]; a statement dated July 12, 1995 regarding appellant's questioning by the Office of the Inspector General of the employing establishment; statements from coworkers [REDACTED]; information regarding an Equal Employment Opportunity (EEO) claim brought by appellant; evidence regarding his referral to the Employee Assistance Program (EAP) at the employing establishment; evidence regarding an EEO claim

filed by Assistant U.S. Attorney [REDACTED]; and an employing establishment memorandum dated January 15, 1997 indicating that [REDACTED] was being reassigned.

The employing establishment submitted a statement dated August 13, 1997, in which [REDACTED], opined that appellant's problems were self-induced. He noted that [REDACTED] had been appellant's direct supervisor from September 1992 until March 1997 and that appellant began to file complaints concerning [REDACTED] after he advised appellant that he was not performing his job in a satisfactory manner and instructed him regarding the need to improve or face adverse action. [REDACTED] stated that [REDACTED] had been investigated and cleared of wrongdoing as the allegations regarding his use of racial slurs were found to lack credibility. He noted that [REDACTED] had been transferred to a bigger office and advised that, at the time appellant filed his claim, he was under a performance improvement plan and was not cooperating with management efforts. [REDACTED] concluded:

"The bottom line is that [appellant] was not performing his duties, adverse action in the form of a demotion took place and this process was carefully reviewed by several layers of management personnel and the legal staff of the [employing establishment]."

In an August 22, 1997 letter, appellant informed the Office that he had filed a Merit Systems Protection Board (MSPB) claim regarding disciplinary action [REDACTED] initiated against him. He further stated that he was doubtful that [REDACTED] would admit blame for allowing [REDACTED] to abuse people the way he did as that would be "tantamount" to [REDACTED] being "equally, if not more, responsible for wrongful conduct." He stated that, [REDACTED] was "disturbed" and retaliated against employees who contacted EAP.

By decision dated December 1, 1997, the Office denied appellant's claim on the grounds that his emotional condition did not arise in the performance of duty. By letter dated September 30, 1999, appellant, through counsel requested reconsideration and submitted a March 16, 1999 MSPB decision, in which an action by the employing establishment reducing appellant's grade was reversed. By decision dated March 1, 2000, the Office denied appellant's reconsideration request, finding that the request had not been filed within one year of the December 1, 1997 decision and did not show clear evidence of error.¹ In a second decision that same date, the Office modified the December 1, 1997 decision. The Office found that appellant had established a compensable factor of employment, in that the MSPB found that the employing establishment had committed error in reducing appellant's grade. The Office, however, found that appellant failed to establish that his emotional condition was caused by this compensable factor and denied the claim. The instant appeal follows.

Initially, the Board notes that the March 1, 2000 decision of the Office, in which it denied appellant's reconsideration request on the grounds that he failed to establish clear evidence of error is moot, inasmuch as that same day the Office issued a decision on the merits of appellant's claim.

¹ The Board notes that in this March 1, 2000 decision, the Office cited language contained in the Code of Federal Regulations that was no longer in effect. Compare 20 C.F.R. § 10.138(b) (1998) with 20 C.F.R. § 10.606 (1999).

The Board finds that appellant failed to establish that he sustained an emotional condition causally related to factors of employment.

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.² Workers' compensation law is not applicable to each and every injury or illness that is somehow related to employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the coverage of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within coverage of the Federal Employees' Compensation Act.³ On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.⁴

In this case, the Board agrees that appellant established that his grade demotion on the part of the employing establishment showed error on its behalf and is, therefore, a compensable factor of employment. Verbal altercations or abuse in the workplace may constitute a compensable factor of employment⁵ and the Board finds that the evidence of record in the instant case is sufficient to establish that appellant's supervisor engaged in verbal abuse, *i.e.*, epithets were made to appellant.⁶ The Board, however, finds his remaining contentions without merit.

As a general rule, a claimant's reaction to administrative or personnel matters fall outside the scope of coverage of the Act.⁷ Absent error or abuse on the part of the employing establishment, administrative or personnel matters, although generally related to employment, are administrative functions of the employer rather than regular or specially assigned work duties of the employee.⁸ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁹ To support

² *Donna Faye Cardwell*, 41 ECAB 730 (1990).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Mary A. Sisneros*, 46 ECAB 155 (1995).

⁶ In an October 4, 1995 statement, [REDACTED], a coworker, stated that [REDACTED] referred to appellant as [REDACTED] in a belittling way. In a February 7, 1996 statement, a second coworker, [REDACTED], reported that [REDACTED] referred to appellant as [REDACTED] on many occasions.

⁷ See *Janet I. Jones*, 47 ECAB 345 (1996).

⁸ *Gregory N. Waite*, 46 ECAB 662 (1995).

⁹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

such a claim, a claimant must establish a factual basis by providing probative and reliable evidence¹⁰ as appellant did in the instant case with the MSPB finding.

Furthermore, an employee's complaints about the manner in which supervisors perform supervisory duties or the manner in which a supervisors exercise supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor must be allowed to perform his or her duties and that in the performance of these duties, employees will at times dislike actions taken. Mere disagreement or dislike of a supervisory or management action is not actionable, absent evidence of error or abuse.¹¹ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹² To support such a claim, a claimant must establish a factual basis by providing probative and reliable evidence.¹³ Thus, appellant's allegations that [REDACTED] "micromanaged" would not be a compensable factor of employment.¹⁴

Lastly, the Board finds that, while appellant established two compensable factors of employment, he did not meet his burden of proof to establish that his emotional condition was work related because he did not submit rationalized medical evidence explaining how these factors caused or aggravated his emotional condition. By letter dated May 27, 1997, the Office informed him of the type of medical evidence necessary to establish his claim, which was to include a comprehensive medical report from his physician.

In a February 11, 1997 report, [REDACTED], a rehabilitation psychologist, advised that appellant had been referred by the EAP at the employing establishment and that he was in obvious emotional distress, "primarily in response to issues stemming from his work setting." He noted that he had taken appellant off duty for the periods July 25 to August 9, 1996 and December 2 to 6, 1996. [REDACTED] concluded: "It is my opinion that his difficulties are a direct and proximate result of work-related issues and circumstances and as such would be considered a work-related disorder." In a February 27, 1997 attending physician's report, he noted dates of appellant's treatment, diagnosed adjustment disorder with mixed anxiety and depressed mood and checked the "yes" box indicating that appellant's condition was employment related. By letter dated July 7, 1997, [REDACTED] referenced a September 17, 1996 letter, written by him in response to a request for an organizational assessment of the employing establishment. In that letter he reported treating 11 of 25 members of the employing establishment professional staff (including appellant) and described the allegations regarding [REDACTED] management style and verbal abuse, all of which, in [REDACTED] opinion, led to

¹⁰ See *Barbara J. Nicholson*, 45 ECAB 843 (1994).

¹¹ *Daniel B. Arroyo*, 48 ECAB 204 (1996).

¹² *Ruth S. Johnson*, *supra* note 9.

¹³ See *Barbara J. Nicholson*, *supra* note 10.

¹⁴ Appellant further alleged that Mr. Kolster made "unreasonable demands" but did not allege specific factors in this regard.

a feeling of futility and being terrorized as characterized by clinical depression and learned helplessness.¹⁵

While [REDACTED] advised that appellant's condition was work related, his reports do not contain a rationalized opinion in which he specifically relates appellant's condition to the accepted employment factors and are thus of diminished probative value.¹⁶ Thus, appellant failed to meet his burden of proof.

The March 1, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 18, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁵ Appellant also submitted several reports from [REDACTED], a licensed social worker. The Board has held that a report from a licensed clinical social worker is not medical evidence, as it is not the report of a "physician" as defined in section 8101(2) of the Act. Such a report has no probative value on the question of appellant's mental competence. *Frederick C. Smith*, 48 ECAB 132 (1996).

¹⁶ See *Victor J. Woodhams*, 41 ECAB 345 (1989).